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No. 84-1177

In the Supreme Court of the United States

OCTOBER TERM, 1984

ROBERT STERLING, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether an indictment charging that the defendant engaged in a continuing criminal enterprise must specify each offense constituting the continuing series of drug violations.

2. Whether multiple offenses arising out of an overall drug importation scheme may serve as separate predicate violations for a charge of conducting a continuing criminal enterprise.

3. Whether drug conspiracies under 21 U.S.C. 846 and 963 may serve as predicate offenses for a charge of conducting a continuing criminal enterprise.

4. Whether the Jencks Act, 18 U.S.C. 3500, required the district court to strike the trial testimony of a government witness because of the prosecution's inadvertent failure to produce the witness's testimony before a grand jury in another case, of which the prosecutor had not previously been aware.

5. Whether the district court improperly limited petitioner's cross-examination of government witnesses.

6. Whether the prosecutor's closing argument, in commenting on the evidence, was improper.

7. Whether the district court erred in denying petitioner's request for a continuance at the conclusion of the defense case so that he could call an additional witness.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 742 F.2d 521.

JURISDICTION

The judgment of the court of appeals was entered on September 10, 1984. A petition for rehearing was denied on November 28, 1984 (Pet. App. 13a). The petition for a writ of certiorari was filed on January 17, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Washington, petitioner was convicted on one count of conducting a continuing criminal enterprise (CCE), in violation of 21 U.S.C. 848 (Count 1); one count of conspiring to import marijuana, in violation of 21 U.S.C. 963 (Count 2); one count of conspiring to possess

marijuana with intent to distribute it, in violation of 21 U.S.C. 846 (Count 3); seven counts of traveling in interstate commerce in aid of racketeering enterprises, in violation of 18 U.S.C. 1952 (Counts 4-9 and 12); two counts of importing marijuana, in violation of 21 U.S.C. 960 (Counts 13 and 14); and one count of possessing more than 1000 pounds of marijuana with intent to distribute it, in violation of 21 U.S.C. 841 (Count 15). On the CCE count, petitioner was sentenced to 40 years' imprisonment and ordered to forfeit certain real and personal property connected to his marijuana business. On the interstate travel and marijuana importation and possession counts, petitioner was sentenced to ten consecutive four-year terms of imprisonment, to run concurrently with the CCE sentence; in addition, he received a total fine of $225,000 and a lifetime special parole term.[1]

The evidence at trial is summarized in the opinion of the court of appeals (Pet. App. 2a-3a). In brief, it showed that in 1980 petitioner initiated a scheme to import 25,000 pounds of Colombian marijuana into Bellingham, Washington. Pursuant to petitioner's direction, a Panamanian freighter, the *Islander,* was purchased and loaded with marijuana. At the same time, petitioner's associates acquired two smaller vessels, the *Tiki* and the *Courageous,* to transport the marijuana from the *Islander* to the Washington coast. Houses were rented in Bellingham and Mount Vernon, Washington, for "stashing" the marijuana.

On July 26, 1981, approximately 5000 pounds of marijuana was transferred from the *Islander* to the *Courageous.* The marijuana arrived in Bellingham that night and was transported to the Mount Vernon house. The *Tiki,* which

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[1]The district court did not impose sentence for the two drug conspiracy offenses on the ground that they were lesser included offenses of the CCE violation.

was loaded after the *Courageous*, arrived in Bellingham the following day. That evening, federal agents raided the Bellingham and Mount Vernon houses and arrested 11 people involved in the operation. Petitioner was arrested eight months later in New York.

In addition to the Bellingham operation, petitioner headed several drug importation and distribution schemes in New York and Florida. These ventures dated back to 1971.

ARGUMENT

1. The CCE count (Count 1) alleged five predicate drug offenses corresponding to the offenses separately charged in Counts 2, 3, 13, 14, and 15. Petitioner contends (Pet. 10-11) that his CCE conviction must be reversed because the indictment failed to allege other predicate offenses dating back to 1971 that were proved at trial and that, in the court of appeals' view, the jury could have relied upon to convict on the CCE count under the district court's instructions.[2]

At the outset, to the extent the district court's charge permitted the jury to consider offenses not enumerated in the CCE count (see note 1, *supra*), petitioner did not object to it at trial. Accordingly, his claim is waived. See Fed. R. Crim. P. 30.

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[2]The district court instructed the jury that, in order to convict, it must find that the offenses enumerated in the CCE count were "*part* of a continuing series of violations" (Pet. App. 9a (emphasis in original)). The court of appeals construed this instruction to mean that the jury could rely on offenses not listed in Count 1 (*ibid.*). For the reasons discussed in the text, the instruction as construed by the court of appeals was not error. However, we doubt that the instruction should be read as the court of appeals did. Rather, the instruction appears simply to require that each offense specifically enumerated in Count 1 be "part of a continuing series of violations" consisting of the other enumerated offenses.

Beyond that, petitioner's argument, even if accepted by the Court, would not entitle him to reversal of his CCE conviction in this case. Under the CCE statute, the government is required to prove three predicate drug offenses to establish the "continuing series of violations."[3] Here, the jury convicted petitioner of each of the five drug offenses specifically alleged in the CCE count. Hence, it is clear the jury found that petitioner had committed the requisite number of predicate violations wholly without regard to his pre-Bellingham activities.

In any event, petitioner's argument is without merit. "[I]n order to support a § 848 charge, the government is not required to plead in any form * * * any of the eligible predicate offenses, but may instead simply prove at trial the continuing series of offenses." *United States* v. *Young,* 745 F.2d 733, 747 (2d Cir. 1984), cert. denied, No. 84-950 (Mar. 25, 1985). This rule is consistent with the general principle that indictments need only "track the language of a statute and, in addition, do little more than state time and place in approximate terms." *United States* v. *Salazar,* 485 F.2d 1272, 1277 (2d Cir. 1973), cert. denied, 415 U.S. 985 (1974). Since it is unnecessary for the indictment to enumerate the individual predicate offenses underlying the CCE charge, it is not error for the government to allege some but not all of those offenses. Indeed, in *United States* v. *Sperling,* 506 F.2d 1323, 1344 (2d Cir. 1974), cert. denied, 420 U.S. 962

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[3]See *United States* v. *Young,* 745 F.2d 733, 747 (2d Cir. 1984), cert. denied, No. 84-950 (Mar. 25, 1985); *United States* v. *Sinito,* 723 F.2d 1250, 1261 (6th Cir. 1983), cert. denied, No. 83-1669 (Oct. 1, 1984); *United States* v. *Phillips,* 664 F.2d 971, 1013 (5th Cir. 1981), cert. denied, 457 U.S. 1136 and 459 U.S. 906 (1982); *United States* v. *Chagra,* 653 F.2d 26, 27-28 (1st Cir. 1981), cert. denied, 455 U.S. 907 (1982); *United States* v. *Valenzuela,* 596 F.2d 1361, 1367 (9th Cir.), cert. denied, 444 U.S. 865 (1979); *United States* v. *Johnson,* 575 F.2d 1347, 1357 (5th Cir. 1978), cert. denied, 440 U.S. 907 (1979).

and 421 U.S. 949 (1975), the court of appeals described as "fatuous" essentially the same claim petitioner raises here—that the indictment was defective because it did not specify each offense in the continuing series of violations. Cf. *United States* v. *Lurz*, 666 F.2d 69, 78 (4th Cir. 1981), cert. denied, 455 U.S. 1005, 457 U.S. 1136, and 459 U.S. 843 (1982); *United States* v. *Johnson*, 575 F.2d 1347, 1356 (5th Cir. 1978), cert. denied, 440 U.S. 907 (1979). Petitioner has cited no authority in support of his contention that a CCE indictment must particularly identify the predicate series of drug violations.

Moreover, the CCE count in the indictment adequately put petitioner on notice that the jury could consider offenses in addition to those specifically listed. In particular, while the Bellingham importation scheme was initiated in 1980, the CCE count expressly stated that the enterprise had commenced in 1971. This clearly indicated that the government was relying not only on the enumerated Bellingham offenses but on earlier offenses as well.[4]

2. Petitioner contends (Pet. 11-14) that his two importation offenses (Counts 13 and 14) and one possession offense (Count 15) constituted a single predicate violation for CCE purposes because they arose out of the same importation scheme. That argument provides no basis for reversal, however, for even if those offenses are only a single predicate, his CCE conviction would still rest on three separate predicate violations for which he was convicted.

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[4]Petitioner's reliance (Pet. 10) on *Ex parte Bain*, 121 U.S. 1 (1887), and *Stirone* v. *United States*, 361 U.S. 212 (1960), is unavailing. See *United States* v. *Miller*, No. 83-1750 (Apr. 1, 1985). Because a CCE count need not set out the specific predicate offenses, this case involves no issue of an amendment to the indictment or a conviction on an offense that the grand jury did not charge. Petitioner does not contend that the previous offenses were not part of the same continuing criminal enterprise as the Bellingham offenses.

In any event, petitioner's importation and possession offenses were properly charged as separate predicate violations in the CCE count. By its terms, the CCE statute requires commission of a "continuing series of violations." 21 U.S.C. 848(b)(2). Contrary to petitioner's contention, it is well settled that a single criminal transaction or scheme can give rise to several offenses. See, *e.g.*, *Albernaz* v. *United States*, 450 U.S. 333 (1981); *Gore* v. *United States*, 357 U.S. 386 (1958). Nothing in the CCE statute suggests either that the word "violations" is not to be given its accepted legal meaning or that the requisite violations cannot arise from a single scheme to import and possess drugs. Once again, petitioner has cited no authority that would justify introducing into the statute the additional element that the continuing series of violations not involve the same criminal scheme.

Petitioner argues (Pet. 12) that, absent the restriction he urges, a CCE offense could be based on "an aberrational event in a person's life" regardless of whether the "person * * * [was] the type of 'professional criminal' at whom Congress directed the continuing criminal enterprise statute." But this ignores the other elements of the CCE offense, including the requirements that the defendant act in concert with five or more other people, that he occupy a position of organizer, supervisor, or manager, and that he obtain substantial income or resources. See 21 U.S.C. 848(b)(2)(A) and (B). Moreover, there is no reason to believe that Congress did not intend the CCE statute to apply to the large-scale marijuana importation and distribution scheme in which petitioner was engaged in Washington.

Petitioner contends in the alternative that even if the offense of possession with intent to distribute is a separate predicate violation, the two importation offenses are only one predicate because they were part of an overall effort to

unload and smuggle marijuana from a single mother ship. However, the statute defines "import" to mean "with respect to any article, any bringing in or introduction of such article into any area [of the United States]." 21 U.S.C. 951(a)(1). This clearly suggests that the appropriate unit of prosecution is each act of importation. Furthermore, each act of importation involves a separate violation of the sovereign interest of the United States in controlling its borders against the influx of contraband drugs. Cf. *Albernaz* v. *United States,* 450 U.S. at 343; *United States* v. *Ramsey,* 431 U.S. 606, 616, 618 (1977). Here, petitioner imported marijuana into the United States on two different boats that arrived on two different days. Just as separate transfers of drugs are separate offenses even though part of a continuous transaction,[5] so too the importations in this case constituted separate violations.[6]

3. Petitioner also contends (Pet. 14-16) that the Section 846 and 963 conspiracies, of which he was convicted in Counts 2 and 3, could not serve as predicate offenses for the CCE charge. The Court has recently declined to review this issue. See *Myers* v. *United States,* cert. denied, No. 84-950 (Mar. 25, 1985). For the reasons stated in our brief in opposition in *Myers* (a copy of which is being sent to counsel for petitioner), petitioner's argument is without

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[5]See, *e.g., Blockburger* v. *United States,* 284 U.S. 299 (1932); *United States* v. *Lartey,* 716 F.2d 955, 967 (2d Cir. 1983); *United States* v. *Weatherd,* 699 F.2d 959, 962 (8th Cir. 1983).

[6]We also note that there was evidence of a number of other offenses committed by petitioner and his enterprise dating back to 1971 that were not separately charged in the indictment or enumerated in the CCE count. If we are correct in our submission in Point 1 that the series of violations required to establish the CCE offense is not limited to those enumerated in the indictment, then petitioner's arguments addressed in this and the next point, even if meritorious, do not demonstrate that the evidence at trial was insufficient to support the "series" element of the CCE charge.

merit and does not warrant further review.[7] And even if the challenged conspiracies could not be used as predicate offenses, petitioner's CCE conviction would nevertheless be supported by the importation and possession offenses for which he was convicted in Counts 13, 14, and 15.

4. On the seventh day of trial, William Lasky was called as a government witness. At that time, Lasky revealed to the prosecutor that he had previously testified before a federal grand jury in New York in connection with a matter relating to the instant case. The prosecutor promptly ordered delivery of the grand jury transcript, but the transcript did not arrive in time for defense counsel to use it in preparing his cross-examination of Lasky. At the close of the cross-examination, the district court granted petitioner permission to recall Lasky when the New York transcript became available, but the material did not arrive before the close of the defense case. The defense then moved to strike Lasky's testimony pursuant to the Jencks Act, 18 U.S.C. 3500(d), which was denied by the district court. Petitioner contends (Pet. 17-21) that the Jencks Act required the court to strike Lasky's trial testimony and that the failure to do so was reversible error.

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[7] *United States* v. *Stricklin*, 591 F.2d 1112 (5th Cir.), cert. denied, 444 U.S. 963 (1979), upon which petitioner relies (Pet. 15), does not compel a contrary conclusion. In *Stricklin*, the court of appeals held that the defendant's previous conviction for a Section 846 conspiracy might, under the Double Jeopardy Clause, bar his later prosecution for a CCE violation based on the same agreement, and it remanded the case for appropriate factual findings. 591 F.2d at 1123. But in this case, as in *Myers* (see U.S. Br. in Opp. at 5), there is no double jeopardy issue, since petitioner's conspiracy and CCE convictions were obtained at a single trial and petitioner was not sentenced at all on the conspiracy counts. Rather, the issue here is the statutory question whether Congress intended to permit a narcotics conspiracy to qualify as a predicate offense under the CCE statute.

Section 3500(d) provides that the district court shall strike the testimony of a witness if the government "elects not to comply with an order of the court * * * to deliver to the defendant any * * * statement [of the witness required to be produced under other provisions of the Act]." The word "elects" in the statute clearly denotes a conscious decision by the prosecutor not to comply with such a court order. See *United States* v. *Crouthers,* 669 F.2d 635, 641 (10th Cir. 1982); *United States* v. *Pope,* 574 F.2d 320, 325 (6th Cir.), cert. denied, 436 U.S. 929 (1978). Here, as the court of appeals correctly concluded (Pet. App. 6a), "the government's failure [to produce the grand jury transcript] was totally inadvertent and not due to any willful attempt to conceal statements from the defense." Indeed, once the prosecutor became aware of Lasky's New York grand jury testimony, he immediately sought to obtain it for use by the defense. Moreover, the prosecutor properly produced all other Jencks Act statements of Lasky and the other government witnesses. In this case, therefore, the prosecutor did not "elect[]," either expressly or by implication, not to produce the Lasky material.

In addition, the unavailability of Lasky's New York grand jury testimony did not prejudice petitioner. As the court of appeals found (Pet. App. 6a), "[t]he New York transcript is essentially duplicative of other Lasky pretrial testimony which was given to defense counsel," and counsel "was able vigorously to cross-examine Lasky using available materials." Beyond that, the court of appeals noted (*ibid.*) that petitioner had conceded that Lasky's testimony was not necessary to prove the government's case. In these circumstances, reversal of petitioner's convictions is plainly unwarranted.[8]

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[8]Petitioner's reliance (Pet. 19) on *United States* v. *Carrasco,* 537 F.2d 372 (9th Cir. 1976), is misplaced. In *Carrasco,* the government destroyed Jencks Act material, an action the court found "unreasonable" (537 F.2d at 376). There is no suggestion here that the government

5. Petitioner asserts (Pet. 21-25) that the district court improperly restricted his cross-examination of three government witnesses: Stephen Cubberly, William Lasky, and Randall Segarra. The court of appeals correctly rejected this claim (Pet. App. 10a).

a. Petitioner argues (Pet. 21-23) that the district court improperly restricted his ability to show that Cubberly had a strong motive to testify falsely. In particular, he objects that the court "barred substantial inquiry" (Pet. 21) on cross-examination into arson charges then pending against Cubberly (2 Tr. 310-311, 313-314), into allegations that Cubberly had attempted to commit murder (*id.* at 315), and into other crimes that Cubberly might have committed and that the government knew about prior to trial (*id.* at 322).

The trial record shows that the cross-examination of Cubberly lasted several hours and covered such matters as Cubberly's involvement in drug sales (2 Tr. 318-320, 327-333), his attempted use of violent means to collect debts (*id.* at 335), his extortionate demand for money from petitioner (*id.* at 361-362), and his efforts to force New York State

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acted unreasonably in any way. And in any event petitioner's claim of an intra-circuit conflict provides no basis for this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901 (1957). Nor does *United States* v. *Beasley*, 576 F.2d 626 (5th Cir. 1978), cert. denied, 440 U.S. 947 (1979), upon which petitioner also relies (Pet. 19-20), involve a contrary holding. In *Beasley*, the court recognized that its "[d]ecision * * * does not turn on reading the Jencks Act so literally as to be a per se rule that failure to produce a statement for any reason, however justified, requires a new trial absent certainty the error is harmless" (576 F.2d at 630). In light of this observation, the court concluded that the unproduced statement "was potentially highly useful to the defense * * * [and] would have been invaluable in cross-examination of * * * [the principal government witness]" (*ibid.*; see also *id.* at 632-633); in these circumstances, the court found that "even if a balancing of values is involved with some account taken of the prosecution's good faith, that good faith here is not enough to outweigh the prejudice to the defendant" (*id.* at 630).

police to seek immunity for him regarding certain criminal acts (*id.* at 318-326). In addition, the jury was informed in detail of the fact that Cubberly faced prosecution in other jurisdictions, his informal immunity agreement with the government in connection with his testimony in this case, and the details of his plea negotiations and agreements with the government (*id.* at 325-328, 333-334). Indeed, contrary to petitioner's suggestion, the fact that Cubberly was under investigation in Ohio for arson was clearly put before the jury on cross-examination (*id.* at 310).

It is well established that the district court has broad discretion to limit cumulative, repetitive, and harassing cross-examination. See, *e.g., Davis* v. *Alaska,* 415 U.S. 308, 316 (1974); *United States* v. *Collins,* 652 F.2d 735, 739 (8th Cir. 1981), cert. denied, 455 U.S. 906 (1982); *United States* v. *Cook,* 608 F.2d 1175, 1182 (9th Cir. 1979), cert. denied, 444 U.S. 1034 (1980); *United States* v. *Dominguez,* 604 F.2d 304, 310-311 (4th Cir. 1979), cert. denied, 444 U.S. 1014 (1980). The district court explained that this was the basis for its rulings excluding more detailed cross-examination on the arson charges, the alleged attempted murder, and unspecified "other crimes" (2 Tr. 351, 353, 356). In view of the vast amount of evidence before the jury concerning Cubberly's motive to testify falsely because of his legal difficulties with the government, the district court did not abuse its discretion in limiting Cubberly's cross-examination.[9]

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[9] Petitioner's reliance (Pet. 22-23) on *Davis* v. *Alaska, supra,* is unavailing. There, the Court concluded that the trial court had erred in completely precluding any inquiry by the defense into the government witness's previous convictions and parole status. In so holding, the Court expressly noted that cross-exmaination for bias is "[s]ubject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation * * *" (*id.* at 316).

b. In order to violate the CCE statute, a person must conduct the enterprise in concert with at least five other persons with respect to whom he occupies a supervisory or managerial position. Petitioner argues (Pet. 23-25) that the district court did not afford the defense an adequate opportunity to cross-examine Lasky to show that he was an independent operator in the drug business and not an employee of petitioner. Contrary to petitioner's claim, the record indicates that Lasky freely admitted at trial that after 1979 he worked only partially for petitioner and purchased substantial amounts of marijuana from suppliers other than petitioner (2 Tr. 544-546, 597-598). In addition, cross-examination explored Lasky's independent control of other employees (2 Tr. 601-603, 620-621, 654), his independent drug dealings (*id.* at 575-586), and his drug profits (*id.* at 601-603, 625-627, 632-633). However, when defense counsel inquired about the amount of money Lasky made in his independent dealings, the district court sustained the government's objection on grounds of relevance (*id.* at 598). Particularly in view of Lasky's overall testimony, including his admission that he did engage in deals outside of petitioner's organization, it was not error for the court to rule that the amount of money Lasky made was not relevant to the issue of petitioner's supervisory or managerial role.

c. At trial, Eleanor Kessler testified that petitioner had recruited her to sell marijuana and that petitioner was her main, though not sole, source of supply throughout the period she sold marijuana. Randy Segarra corroborated Kessler's testimony that she had purchased several thousand pounds of marijuana from petitioner in 1979 and 1980. Petitioner claims (Pet. 23-25) that the district court improperly prevented him from asking Segarra about other people from whom Kessler had purchased marijuana in order to show that she was not an employee of petitioner. But, in fact, the defense was permitted to ask Segarra about Kessler's other sources of supply (2 Tr. 562-563). Moreover,

the details concerning these other sources were elicted by the government on redirect examination (*id.* at 571-572). Any limitation on cross-examination in this regard was for the purpose of avoiding repetitive questioning.

6. Three government witnesses testified at trial that they saw or spoke to petitioner in Seattle on the weekend of the Bellingham importation (1 Tr. 213-214, 739-741; 2 Tr. 45). During the defense case, petitioner introduced his passport, which contained a date stamp indicating that he was in the Bahamas on that weekend (2 Tr. 777-780). In closing argument, the prosecutor pointed out that petitioner's presence in Seattle on the weekend in question was not a necessary element of the charges against him or a critical part of the government's proof (E. 123-124).[10] The prosecutor then stated (*id.* at 125):

> The government hasn't proven to you how the stamp got in the book, the defense can't prove it either. No one knows how the stamp got in the book, but I submit in view of the testimony that has been produced to you from the witnesses that I have mentioned in the past hour and whose credibility is bolstered by the records seized from them at the time of the arrest when they didn't have an opportunity to manufacture anything * * * [petitioner] is the kingpin of this organization.

Petitioner contends (Pet. 25-27) that the prosecutor's comments were improper because they suggested, without any basis in the record, that petitioner had falsified his passport.

A prosecutor is free in summation to comment on the evidence presented at trial, including all inferences that can reasonably be drawn from that evidence. See, *e.g., United States* v. *Gorostiza,* 468 F.2d 915, 916 (9th Cir. 1972). Fairly understood, "the one isolated matter" (Pet. App.

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[10]"E." refers to petitioner's Excerpts From Record in the court of appeals.

10a) in the prosecutor's closing argument that petitioner challenges[11] did no more than point out the conflict in the evidence concerning petitioner's whereabouts during the weekend of the Bellingham importation. Contrary to petitioner's characterization, the prosecutor did not advance a theory of deliberate falsification by petitioner, accuse the defense of bad faith or impropriety, or refer to facts outside the record. In any event, even if the prosecutor's remark could be understood to suggest falsification of petitioner's passport, it would not be error. One permissible inference from the conflict in the evidence was that, in light of the testimony of three government witnesses, petitioner's passport had been altered and did not truthfully indicate that he had been in the Bahamas as he contended. Insofar as the prosecutor's statement may have suggested this possible explanation, it was not outside the scope of fair comment on the evidence.

Moreover, as the court of appeals recognized (Pet. App. 10a), the alleged error did not pose "a serious possibility of prejudice to [petitioner]." Not only was the prosecutor's statement only one isolated part of a nine-day trial, the issue whether petitioner was in Seattle or in the Bahamas did not involve an element of the offenses of which he was convicted and thus was "a non-essential matter" (*ibid.*). Accordingly, there is no basis for petitioner's claim of reversible error.

7. Finally, petitioner contends (Pet. 27-29) that the district court erred in refusing to grant him a 24-hour continuance at the conclusion of the defense case. Defense counsel stated that he wished to call an additional witness who allegedly would testify that petitioner had legitimate

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[11]See *Donnelly* v. *DeChristoforo*, 416 U.S. 637, 646-647 (1974).

sources of income during the period in which the government claimed his funds came solely from drug activities.[12]

The question of a continuance is within the discretion of the district court. See, *e.g., Ungar* v. *Sarafite,* 376 U.S. 575, 589 (1964). At the very least, a party who seeks a continuance in order to call an additional witness should establish the identity of the witness, the substance of his testimony, the grounds to believe that the testimony will be competent and relevant, and the exercise of due diligence in attempting to obtain the witness's timely presence at trial. See *United States* v. *Sandoval-Villalvazo,* 620 F.2d 744, 748 (9th Cir. 1980).

In this case, defense counsel represented that "[t]his witness would testify as to [petitioner's] involvement in the film industry, as to his profits and legitimate earnings based on the film and entertainment industry" (E. 35). Counsel did not give the witness's name, indicate how the witness was in a position to know about petitioner's activity in the film business, or show that the testimony would otherwise be competent. Moreover, the defense had long been aware of the trial calendar and of the district court's other commitments that required the trial to conclude on schedule (see 7/23/82 Tr. 6, 68, 72; 3 Tr. 257-259). The fact that it was not convenient for the witness to appear at an earlier time, as defense counsel stated (E. 23, 35), falls far short of the necessary showing of due dilegence.[13] In these circumstances, the court of appeals correctly concluded (Pet. App.

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[12]Petitioner indicates (Pet. 27) that this issue relates only to the question of forfeiture pursuant to the CCE statute and not to his guilt or innocence on any of the counts.

[13]Petitioner states (Pet. 29) that the witness could not appear earlier because of "visa problems." But this confuses the witness whose proffered testimony concerned petitioner's participation in the film business with another defense witness who was arriving from Switzerland (see E. 23).

11a) that the district court did not abuse its discretion in declining to continue the trial.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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